Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DARLENE WALTERS,
PETITIONER,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC.
AND LEONARD BIEBER.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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63 pp

QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1988 & Supp. V. 1993), applies only to an "employer," defined in Section 701(b), 42 U.S.C. § 2000e(b) (1988), to be "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."

The question presented is:

Whether that jurisdictional definition is satisfied when an employer maintains fifteen or more employees on the payroll for the requisite number of weeks even though fewer than fifteen employees report to work or are on paid leave on each day of each such week, as to which the courts of appeals are in direct conflict.

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PETITION FOR A WRIT OF CERTIORARI

Darlene Walters respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is as yet unreported in the Federal Reporter, but is

reported at 1995 WL 422839. The opinion and order of the district court (App., *infra*, 13a-19a) are reported at 864 F. Supp. 71.

JURISDICTION

The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) (1988), and under 28 U.S.C. § 1331 (1988). The judgment of the court of appeals was entered on July 18, 1995, affirming the judgment of the district court that dismissed petitioner's suit for lack of subject matter jurisdiction. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

This case involves the construction of Section 701(b) of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, Title VII, § 701(b), 78 Stat. 241, 253 (1964), as amended by Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 104-05 (1972), 42 U.S.C. § 2000e(b) (1988), reproduced in the Appendix, *infra*, 20a, which provides, in relevant part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . .

Also reproduced in the Appendix are relevant provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1988 & Supp. V 1993) (App., *infra*, 24a-26a), and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.* (Supp. V 1993) (App., *infra*., 26a-29a).

STATEMENT OF THE CASE

1. Respondent Metropolitan Educational Enterprises, Inc. (Metropolitan) sells encyclopedias, dictionaries and educational materials throughout the United States and arranges financing for its customers. Respondent Leonard Bieber is the company's president and sole shareholder. R. 37, 40.

Petitioner Darlene Walters was employed by Metropolitan as a collector. In April, 1990, after being denied a promotion to credit manager, she filed a charge of gender discrimination with the Equal Employment Opportunity Commission (EEOC). Metropolitan then terminated her employment. She then filed an EEOC charge for retaliation. App., *infra*, 14a.

In April, 1993, three years after Ms. Walters' discharge, the EEOC filed suit against respondents alleging that the discharge was illegal retaliation in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-3(a) (1988). App., *infra*, 14a. Ms. Walters intervened as a matter of right under 42 U.S.C. § 2000e-5(f)(1) (1988), asserting that respondents had illegally

denied her the promotion because of her gender and then had illegally fired her in retaliation for her filing the EEOC charge. *Id.* at 14a; R. 9-11.

2. Metropolitan moved to dismiss for lack of subject matter jurisdiction, claiming under the rule of *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983), that it was not an "employer" under Title VII because it had fewer than the minimum jurisdictional number of employees. App., *infra*, 14a, 16a. In *Zimmerman*, which involved the nearly identical jurisdictional provision of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 630(b) (1982) (*Id.* at 24a), the Seventh Circuit held that hourly employees are considered employees under the ADEA only on days they were either physically present at work or on paid leave. *Id.* at 16a.

Ms. Walters and the EEOC urged the district court to reject *Zimmerman* and to count instead the number of employees on Metropolitan's weekly payroll, arguing that this "payroll" method was supported by Title VII's legislative history, by judicial authority from other circuits, and by the EEOC's own administrative construction of the jurisdictional statute. Ms. Walters and the EEOC also argued that in 1993 Congress had endorsed the payroll method in enacting almost identical language into the Family and Medical Leave Act of 1993 (FMLA), Pub. L. No. 103-3, § 101(4)(A), 107 Stat. 6, 8 (1993), codified at 29 U.S.C. § 2611(4) (Supp. V 1993), (App., *infra*, 28a); S. Rep. 103-3, 103d Cong., 1st Sess. 21-22 (1993) *reprinted*

in 1993 U.S.C.C.A.N. (107 Stat.) 23-24.

Discovery focused on that jurisdictional question — *i.e.*, the number of employees working for Metropolitan during 1989 and 1990. For the next eight months, the parties examined at great length two years of Metropolitan's payroll registers, time cards, work diaries, and other timekeeping records. R. 37. The parties compiled the information gleaned from that discovery into detailed summaries of the days and weeks worked by each Metropolitan employee and then submitted the issue to the district court on a stipulated record. *Id.*

The parties stipulated that respondent Bieber was Metropolitan's only salaried employee and that there were two regular part-time employees and between eleven and fifteen full-time hourly employees. The parties stipulated that Metropolitan had fifteen or more employees on its payroll for forty-seven weeks in 1990, but that fifteen or more employees had been physically present at work or on paid leave on each working day of only nine of those weeks. App., *infra*, 15a; R. 37. These facts meant that Metropolitan did not meet the jurisdictional minimum under the *Zimmerman* day-by-day method, but would meet the jurisdictional minimum under the payroll method advocated by Ms. Walters and the EEOC. The district court's jurisdiction thus turned on the method of counting Metropolitan's part-time and regular full-time hourly employees.

The parties also stipulated that Metropolitan did not

have fifteen or more employees in 1989, the year preceding Ms. Walters' termination. App., *infra*, 15a; R. 37. Other stipulations between Ms. Walters and respondents established that Metropolitan was indeed a company engaged in an industry affecting commerce in that it had a large number of independent sales representatives (stipulated by the parties not to be Title VII employees) who sold Metropolitan's product lines by door to door solicitation throughout the country and who arranged for installment financing of those sales. (R. 40).

The district court granted Metropolitan's motion to dismiss on the basis of *Zimmerman* and the stipulated facts. App., *infra*, 18a-19a. The court reasoned that *Zimmerman*, an ADEA case, controlled this, a Title VII case, because of the common purpose of Title VII and the ADEA and their virtually identical definitions of "employer." *Id.* Therefore, the court declined to adopt the payroll method of counting employees for the reason that it could not "modify Seventh Circuit precedent." *Id.* at 17a.

3. A panel of the court of appeals affirmed, holding that the arguments of Ms. Walters and the EEOC were not sufficiently compelling to overcome the stare decisis effect of *Zimmerman*. App. at 5a-6a, 11a. Thus, the court held that hourly and part-time workers are to be counted as Title VII employees only on the days they are "physically present at work or are on paid leave." *Id.* at 3a-4a, 6a.

Although *Zimmerman* had been an ADEA case, the

court of appeals concluded that it controlled this Title VII case because of the "mirror similarity" between the two jurisdictional statutes. App., *infra*, 4a, n.2.

Although "agreeing that the statute could have been worded more clearly," the court of appeals reaffirmed *Zimmerman's* reading of the "plain text" of the statute. App., *infra*, 6a. The court of appeals reaffirmed *Zimmerman's* conclusion that the day-by-day method was the only construction of the statute that gave meaning to the statutory phrase "for each working day." The court rejected as "unlikely" the construction of that phrase that would more appropriately cover employees who enter or leave employment mid-week. *Id.* at 6a.

While agreeing that the legislative history supported the payroll method of counting, the court of appeals reiterated *Zimmerman's* conclusion that the legislative history of Title VII was "too confused and chaotic to be of much use." App., *infra*, 5a, n.3.

While noting that Congress had endorsed the payroll method in 1993 when enacting a nearly identical jurisdictional provision in the FMLA, the court held that this legislative history by a later Congress enacting a different statute was of no force and did not resolve the judicial conflict. App., *infra*, 7a-9a.

While noting the several contrary decisions by other circuits and district courts, the court of appeals noted the number of decisions following *Zimmerman*, and concluded

that the relatively even split of authority "hardly presents a pressing reason to overturn settled precedent." App., *infra*, 10a.

While recognizing that the EEOC had formally adopted the payroll method in its administrative compliance procedures, the court of appeals declined to follow the EEOC policy because it had been adopted after *Zimmerman* and because the court, not an administrative agency, was "the final arbiter of statutory construction." App., *infra*, 10a.

Finally, the court of appeals rejected public policy concerns regarding the potential under the day-to-day test for an employer's evasion of Title VII and the ADEA, and discounted the burden on district courts under that test of counting every employee for every work day for a two year period. App., *infra*, 11a.

Judge Ripple concurred in the panel's decision. He stated, however, that "the correctness of *Zimmerman* . . . is not free from doubt . . . ." App., *infra*, 11a. He acknowledged the "thoughtful divergence of opinion" from the other circuits, but he "reluctantly" concluded that those cases do not "cast such a shadow on *Zimmerman* as to justify its overruling." Judge Ripple noted that this issue deserved "definitive legislative attention" and concluded by emphasizing that

> The ambiguity of the present situation ought to be clarified. The scope of Title VII ought to be the same in Boston and New Orleans as it is in Chicago. *Id.* at 12a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that in determining jurisdiction under Title VII, hourly and part-time employees are only counted on the days they report to work or are on paid leave.

That ruling directly conflicts with decisions of two other circuits and of numerous district courts, creating a lack of uniformity in the jurisdiction of the federal courts in both Title VII and ADEA cases. The ruling also conflicts with the EEOC's adoption and application of the payroll method in determining its own jurisdiction in administrative investigations, thus clouding that process. The ruling also imposes an unnecessary burden on the district courts and fails to recognize the realities of the changing American work place. The ruling is not in accord with the text of the statute and its legislative history. Finally, the ruling injects a substantial irrational disharmony into the interpretation of closely related statutory schemes which contain virtually identical provisions. Review by this Court is therefore warranted.

1. a. As the Seventh Circuit's decision in this case acknowledges, the circuits are split on the question of counting employees for jurisdictional purposes under Title VII and the ADEA. App., *infra*, 8a-9a. The Seventh Circuit's decisions in this case and in *Zimmerman* conflict

with decisions from the First and Fifth Circuits. *Vera-Lozano v. International Broadcasting*, 50 F.3d 67, 69-70 (1st Cir. 1995) (Title VII); *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634-35 (1st Cir. 1983) (Title VII), cert. denied, 466 U.S. 904 (1984); *Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 979 n. 7 (5th Cir. 1980) (Title VII).

This conflict also includes the Eighth Circuit which has followed the *Zimmerman* approach. *McGraw v. Warren County Oil Co.*, 707 F.2d 990 (8th Cir. 1983) and *EEOC v. Garden and Assocs., Ltd.*, 956 F.2d 842 (8th Cir. 1992).

When the Seventh Circuit first visited this issue in 1983 in *Zimmerman*, it concluded that there was little legislative history or case law interpreting the ADEA, the statute involved in that case, and Title VII, the statute from which the ADEA jurisdictional provision was borrowed. *Zimmerman* concluded that the phrase "for each working day" would be rendered meaningless unless it was construed to mean that hourly employees are considered employees only on days when they were either physically present at work or on paid leave. 704 F.3d at 353-54.

In this case, however, the Seventh Circuit acknowledged that "the statute could have been worded more clearly" (App., *infra*, 6a), and that the legislative history does support the payroll method advocated by petitioner. *Id.* at 5a, n.3. Nevertheless, the court reaffirmed *Zimmerman's* interpretation of the "plain language of the statute." *Id.* at 6a.

In contrast, in 1983, the First Circuit rejected the day-by-day method and held that the jurisdictional number is determined by counting the employees on the payroll regardless of whether they report to work each work day of a work week. *Thurber*, 717 F.2d at 634-35. Furthermore, the First Circuit reached exactly the opposite conclusion from the Seventh Circuit with respect to Title VII's legislative history, determining that the legislative history "weighs heavily against" a day-by-day approach. *Id.* at 634.

That twelve year old conflict between *Zimmerman* and *Thurber* persists. Four months before the Seventh Circuit decided this case, the First Circuit reaffirmed *Thurber's* interpretation of both the statute and the legislative history and approved again the payroll counting method. *Vera-Lozano*, 50 F.3d at 69-70.

This conflict of result and rationale between the circuits is unlikely to abate. The two strands of case law are irreconcilable.

b. In addition, there is a growing number of conflicting federal district court decisions.

Several district courts have adopted the payroll method advocated by petitioner but rejected by the Seventh Circuit. *Edwards v. Esau Investments, Inc.*, 66 Fair Empl. Prac. Cas. (BNA) 711 (D. Kan. 1994) (Title VII); *Shepherdson v. Local Union No. 401*, 823 F. Supp. 1245, 1251-52 (E.D. Pa. 1993) (Title VII); *Reith v. Swenson*, 63

Fair Empl. Prac. Cas. (BNA) 885, 897 (D. Kan. 1993) (Title VII); *Cohen v. S.U.P.A. Inc.*, 814 F. Supp. 251, 254-56 (N.D.N.Y. 1993) (ADEA); *Vano v. Au*, 1992 WL 175498 at *2 (W.D. Va. 1992); *Simmons v. Vliets Farmers Coop.*, 55 Fair Empl. Prac. Cas. (BNA) 1341, 1342 (D. Kan. 1991); *Gorman v. North Pittsburgh Oral Surgery Assocs., Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987) (ADEA); *Evans v. Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. (BNA) 1553, 1554 (M.D.N.C. 1984) (Title VII), *aff'd*, 769 F.2d 1012, 1014 (4th Cir. 1985); *Lynn v. JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983) (Title VII); *Hornick v. Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980) (Title VII); *Pedreyra v. Cornell Prescription Pharmacies, Inc.*, 465 F. Supp. 936, 941 (D. Colo. 1979) (Title VII); *Pascutoi v. Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl. Prac. Cas. (BNA) 1325, 1327 (D. Minn. 1975) (Title VII), *aff'd*, 566 F.2d 1178 (8th Cir. 1977).

In contrast, other district courts have adopted the Seventh Circuit's day-by-day approach. See, *e.g.*, *Richardson v. Bedford Place Housing Phase I Assocs.*, 855 F. Supp. 366 (N.D. Ga. 1994) (Title VII); *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992) (ADEA and Title VII); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 34-35 (D. Me. 1992) (ADEA); *Norman v. Levy*, 756 F. Supp. 1060, 1063-64 (N.D. Ill. 1990), *supplemental opinion* 767 F. Supp. 1441 (N.D. Ill. 1991) (Title VII); *EEOC v. Argent Industries, Inc.*, 746 F. Supp. 705, 708-09 (S.D. Ohio 1989) (ADEA); *Schoenbaum v. Orange County Center for the Performing*

Arts, Inc., 677 F. Supp. 1036, 1039 (C.D.Cal. 1987) (ADEA).

Even in some district court decisions following the Seventh Circuit's day-by-day counting method, doctrinal confusion is evident. *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. at 34-35, an ADEA case, applied the day-by-day approach, ignoring without mention the First Circuit's contrary ruling under Title VII in *Thurber*. The district court in *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. at 1332, was bound to follow *Zimmerman*, but soundly criticized it and strongly urged its reconsideration. This confusion is apt to continue, as is the conflict among the district courts.

2. The conflict is not limited to the courts, but reaches as well to the EEOC's national administrative and investigative responsibilities.

As part of its own internal compliance policy-making administrative and investigative processes, the EEOC has explicitly rejected the day-by-day counting method and instead has formally adopted the payroll method in determining its own jurisdiction under both Title VII and the ADEA. EEOC Policy Guidance, Notice No. N-915-052, EEOC Compliance Manual, Vol. II, II EEOC Comp. Man. (BNA), 8 FEP Man. 405:6857 (April 20, 1990), reproduced in the Appendix, *infra*, 30a-40a.

The deluge of claims cascading into the EEOC is no secret. Nor is the EEOC's backlog of cases and delay in

processing claims. EEOC Office of Program Operations, Enforcement Statistics, FY 1984-FY 1994 (February 1995). Under the state of the law now, the EEOC must apply different jurisdictional tests in different parts of the country. As a result, the EEOC's jurisdictional determination standards and procedures have necessarily been thrown into turmoil, resulting in the balkanization of its investigative process.

Moreover, the obvious burden on the EEOC to count jurisdictional employees for every work day of a two year period poses a serious concern about the ability of that overburdened, underfunded agency to fulfill its statutory duties. In turn, any degradation of those duties will effect the continued legitimacy of the agency with the citizens it serves — both claimants and respondents.

The seriousness of this burden on the EEOC also spills into the district courts' adjudication of Title VII and ADEA cases. Although the Seventh Circuit dismissed petitioner's arguments about the burden on the district courts and litigants arising from the *Zimmerman* requirement of counting employees on every work day of a two year period, the fact remains that the payroll method advocated by petitioner is a much easier one to apply: all one need do is examine straightforward payroll documents. Given the extraordinary workload of our district courts, especially in metropolitan areas like Chicago, Boston and New Orleans, the concern about the time-consuming and cumbersome day-by-day counting method is a real one deserving of more in-depth consideration.

These concerns are not merely theoretical but touch this case. The EEOC investigation in this case took three years, and the jurisdictional determination by the district court another year and a half, all in a case involving a stipulated factual record.

Thus, for these reasons of judicial and regulatory administration, this jurisdictional issue is of sufficient practical importance to justify review by this Court.

3. The Seventh Circuit's reading of the legislative history also seems misplaced.

While the route of Title VII as a whole through Congress was complicated due to the controversy over civil rights legislation in the climate of 1963 and 1964, the form of the jurisdictional minimum of employees remained constant from the first day Senate Majority Leader Mansfield and Minority Leader Dirksen introduced their compromise version of Title VII until its enactment into law. *Compare* Amendment No. 1052 in the Nature of a Substitute, 110 Cong. Rec. 13310, 13314 (1964), *with* text of Title VII as enacted, Pub. L. No. 88-352, Title VII, § 701, 78 Stat. 241, 253 (1964).

As a co-sponsor of that compromise, Senator Dirksen clearly described the source and purpose of the jurisdictional minimum contained in his proposed Title VII. 110 Cong. Rec. 13087 (1964). As he explained, the concept of a jurisdictional minimum was based on a similar provision of the Unemployment Compensation Act

(UCA). *Id.*; *see*, Social Security Act of 1935, Pub. L. 74-271,Title IX, § 907(a), 49 Stat. 620, 642 (1935), *reenacted and codifed by* Internal Revenue Code of 1939, Pub. L. 76-1, ch. 9, § 1607(a), 53 Stat. 1, 187 (1939), 26 U.S.C. § 1607(a) (1940) (currently codified as further amended at 26 U.S.C. § 3306(a) (1988)). At the time of the enactment of Title VII, that provision of the UCA had long been construed to include all employees on the payroll without regard to their presence at work on each work day. Rev. Rul. 55-19, 1955-1 C.B. 496.

This clarity in the legislative history moved the First Circuit to twice reject the day-by-day approach. *Thurber*, 717 F.2d at 634-35; *Vera-Lozano*, 50 F.3d at 70.

This clarity in the legislative history in turn raises substantial questions about the Seventh Circuit's conclusion that the legislative history was "confused and chaotic." App., *infra*, 5a, n.3.

4. The central rationale of the Seventh Circuit in *Zimmerman* and this case was that the day-by-day method is the only construction that would give meaning to the statutory phrase "for each working day." Under the payroll method, the court concluded, that phrase would be rendered meaningless. *Zimmerman*, 704 F.2d at 353-54.

In fact, that reading of "for each working day" is not the only one that gives effect to the whole of the statute. For example, in *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. at 1331-32, the district court proposed that

the statutory phrase "for each working day" has meaning under the payroll method because, by using the phrase "employer . . . who *has* fifteen or more employees for each working day . . ." (emphasis added), the statute focuses on the employment relationship rather than the employee's presence at work on each such day.

Thus, the court of appeals was incorrect in concluding that the "day-to-day" construction was the only one that gave meaning to the statute.

5. Furthermore, the court of appeals' reading of the statute is at odds with the changing realities of the American work place.

Petitioner suggested to the court of appeals that the phrase "for each working day" has meaning under the payroll method because it accounts for employees who enter or leave employment in mid-week. The court of appeals' rejection of this scenario as "unlikely" (App., *infra*, 6a) is unpersuasive as a matter of principle and is contrary to the facts of this case in which such mid-week employment changes occurred *nine* times and included the *mid-week* illegal termination of Ms. Walters. R. 37.

Furthermore, the payroll method, but not the day-to-day test, takes into account employers whose payroll periods begin and end in mid-week and whose employees start or end their employment at the beginning or end of such a payroll period.

The day-to-day test also does not account for the increasing phenomenom of "flextime" whereby, for example, employees work ten hours on four days a week rather than eight hours on five days. Under the day-to-day test, such workers are not considered as Title VII employees even though they work the same forty hours as the "nine-to-fiver" who works Monday to Friday. That work pattern was also present in this case but was ignored by the court of appeals.

The court of appeals' analysis does not account for the ever increasing labor phenomenon of part-time employment. Under the court's reading of the statute, an employer could have far more than fifteen part-time employees on its payroll, but only fourteen employees at work on one day of each work week. Such an employer would not be covered by Title VII or the ADEA.

And what of the burgeoning practice of "telecommuting"—employees who work from their homes maintaining contact with the office by telephone and computer? Or what of employers with a sales force of commissioned salespersons who work from their homes and who are paid only when they consummate a sale? It would necessarily be difficult to determine when if ever such salespersons are "at work" or when they are paid, such as, for example, during a "dry spell" when they are on the road, but making no sales and generating no commissions. The anomaly of the court of appeals' ruling is that such salespersons would not be counted as Title VII and ADEA employees.

Thus, the court of appeals' analysis is substantially at odds with the practical realities of commonplace employer/employee payroll and employment practices.

Moreover, the day-to-day method creates an unwarranted class-based distinction between, on the one hand, salaried employees more likely to be professionals, and, on the other hand, hourly and part-time workers, more likely to be women and minorities. What sense does it make to treat the intended beneficiaries of Title VII as jurisdictional employees only on the days they work, but to count professional salaried employees on all work days whether or not present at work?

These concerns are especially significant in this, a Title VII case, because of the ever increasing number of women who are entering the American workforce, some for personal fulfillment, but most because of the financial necessities of our times: in the traditional two parent home, two wage earners are required to maintain the desired living standard. In this era of divorce and family dissolution, the pressure to work on a woman heading a single parent home is much more dire. And what of single women who enter the workforce to support themselves? It is simply unwise judicial policy to exempt such women from the coverage of Title VII because they might work part-time or on flexible schedules rather than nine-to-five, Monday to Friday.

6. The definition of "employer" in Title VII and in the ADEA is virtually identical to that of the recently

passed Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4) (Supp. V 1993). App., *infra*, 28a. All three include the "for each working day" language which convinced the Seventh Circuit to apply the day-by-day method. In enacting the FMLA, however, Congress explicitly indicated that this language means employ in the sense of maintain on the payroll, just as "most courts and the EEOC have interpreted" it, and not in the sense of physical presence at work. S. Rep. 103-3, 103d Cong., 1st Sess. 21-22 (1993) *reprinted in* 1993 U.S.C.C.A.N. (107 Stat.) 23-24. App. *infra*, 7a.

It is apparent, therefore, that the jurisdictional language of the FMLA will be construed under the payroll method. *Cf. Astrowsky v. Fort Portland Mortgage Corp.*, 1995 WL 349000 (D.Me. 1995) (noting close similarity of jurisdictional provisions of Title VII, the ADEA and the FMLA). However, under the Seventh Circuit's decision in this case, virtually identical statutory language in the closely related statutory schemes of Title VII and the ADEA will be construed under the opposite day-to-day method. This disharmony is obviously irrational and should be eschewed.

The Seventh Circuit lost the opportunity to harmonize and settle the construction of these important closely related statutory schemes. This case gives this Court the opportunity to accomplish that important purpose.

7. In terms of judicial craftsmanship, this case is an appropriate vehicle for review. The record is streamlined

and is based on simple straightforward stipulations that starkly frame the jurisdictional issue. The issue presented is solely a question of law to be reviewed *de novo* by this Court.

8. The actual practical effect of the circuit split is that the jurisdiction of a federal district court, in both Title VII and ADEA cases, depends on its location. Further, the EEOC's administrative and investigative jurisdiction is substantially clouded by this conflict. The rule approved by the court of appeals imposes an undue and unnecessary burden on the district courts. The rule does not properly account for the changing realities of the American work place. The rule is not in accord with the statute's text and its legislative history. The rule injects irrational disharmony into the interpretation of closely related statutory schemes.

In sum, a uniform rule is needed. As Judge Ripple stated: "[t]he scope of Title VII ought to be the same in Boston and New Orleans as it is in Chicago."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST, 1995

APPENDIX A

United States Court of Appeals
For the Seventh Circuit

Nos. 94-3334 and 94-3592

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

AND

DARLENE WALTERS,
Intervening Plaintiff-Appellant,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INCORPORATED, AND LEONARD BIEBER,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 2099—**James B. Moran**, *Chief Judge.*

Argued April 7, 1995—Decided July 18, 1995

Before CUMMINGS, EASTERBROOK and RIPPLE, *Circuit Judges.*

CUMMINGS, *Circuit Judge*. This case presents the question whether, by virtue of recent legislative developments or a closer look at old ones, this Court should overrule its decision in *Zimmerman v. North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983). In that case, we defined "employer" in the context of the Age Discrimination in Employment Act ("ADEA"), a construction since extended to other anti-discrimination legislation including Title VII. The Equal Employment Opportunity Commission ("EEOC") urges us to adopt a more expansive definition. Intervening plaintiff Darlene Walters joins in this plea for the simple reason that our *Zimmerman* definition forecloses her Title VII retaliatory discharge claim against the defendants, her former employer and the company's president. We are not persuaded that subsequent events dictate overruling *Zimmerman*, however, and therefore reject the EEOC's and Walters' invitation to do so.

BACKGROUND

The EEOC sued Metropolitan under § 704(a) of Title VII (42 U.S.C. § 2000e-3(a)) in 1993, alleging that Metropolitan had fired Walters three years earlier in retaliation for her filing of a gender discrimination charge. Walters subsequently intervened as plaintiff. Metropolitan moved to dismiss the suit for lack of subject matter jurisdiction, alleging that the company was not an "employer" under Title VII, and the parties proceeded to discovery on that question. In August 1994, after analyzing the parties' stipulations regarding Metropolitan's

payroll records, the district court granted defendants' motion to dismiss on the ground that Metropolitan did not qualify as an employer under Title VII and there was accordingly no federal jurisdiction.[1] 864 F. Supp. 71, 73 (N.D. Ill. 1994).

Under Title VII, an employer is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b). The statute does not explicitly prescribe a method of counting employees to verify whether the requisite minimum of 15 is reached, but two have emerged from case law. One, endorsed by the EEOC and adopted by a number of courts, is the "payroll method." It looks at the number of employees maintained on an employer's payroll within a given week: if this number is at least 15 for at least 20 calendar weeks the jurisdictional minimum is satisfied, regardless of whether or not every employee on the payroll shows up for work every day of the calendar week.

The alternative method counts all salaried employees toward the minimum, but takes a different approach toward hourly or part-time workers. Such workers are considered employees only on days when they are physically present at work or are on paid leave. The jurisdictional minimum of employees must be at the

[1] Walters brought pendent state claims in addition to her Title VII claim, which the district court also dismissed.

workplace or on paid leave for each day of the work week, or the week will not be counted.

In *Zimmerman*, the Seventh Circuit endorsed this counting system and rejected the payroll approach.[2] The panel in that case examined the statutory language of the ADEA and focused on its provision (like Title VII's) that an employer must have the requisite number of employees "for each working day of a week before that week can be counted toward the jurisdictional minimum." *Id.* at 353-354. Seeing no way to reconcile the phrase "for each working day" with the payroll method, the panel held that the correct method excluded hourly paid workers on days when they were neither working nor on paid leave. *Id.* To conclude otherwise, the *Zimmerman* panel held, would

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[2] *Zimmerman*, as we have stated, involved a claim brought under the ADEA rather than one brought pursuant to Title VII. The district court, however, properly found *Zimmerman* dispositive. Because Title VII and the ADEA have a common purpose, we have relied upon cases interpreting a definition in one statute as persuasive when construing a similar definition in the other. *Hayden v. La-Z-Boy Chair Co.*, 9 F.3d 617, 619 (7th Cir. 1993), certiorari denied, 114 S. Ct. 1371.

The ADEA's definition of employer is "essentially identical to Title VII's," and "[c]ourts routinely apply arguments" to the two interchangeably. *EEOC v. AIC Security Investigations, Ltd.*, Nos. 93-3839, 94-1018, 94-2895 and 94-3089, 1995 U.S. App. LEXIS 12139, at *5 and n.1 (7th Cir. May 22, 1995); see also *Zimmerman*, 704 F.2d at 352 (ADEA provision is "nearly identical to the definition of employer in Title VII."). While Walters argues that we may view this case unfettered by *Zimmerman*, therefore, the mirror similarity between the definition of employer in the two contexts and their common purpose counsels—indeed requires—deference to our precedent.

render the words "for each working day" superfluous and would be contrary to the "explicit definitional restriction chosen by Congress." *Id.*[3] The panel also noted that had Congress wanted to define the jurisdictional minimum in terms of the number of employees on the payroll each week, it could certainly have done so. *Id.*

ANALYSIS

The EEOC and Walters aim a fusillade of arguments at *Zimmerman*. Primarily they contend that in enacting the Family and Medical Leave Act ("FMLA"), Congress endorsed the payroll method over the *Zimmerman* alternative in a manner that counsels deference from this Court. They also point to other case law and the EEOC's own guidelines which are contrary to the holding in *Zimmerman*. Finally, they submit that the payroll approach comports better with public policy considerations.

In considering these arguments, we bear in mind that

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[3] The *Zimmerman* panel also concluded that the legislative history of Title VII, on which the relevant provisions of the ADEA are based, offered little interpretive assistance. 704 F.2d at 352-353. Plaintiffs contend that in fact, the legislative history of Title VII supports their reading, and base this argument on remarks of Senator Dirksen which suggest that Title VII's definition of employer was borrowed from the Unemployment Compensation Act. Although certain remarks of Senator Dirksen are consistent with plaintiffs' argument, we agree with the *Zimmerman* court that the legislative history of Title VII is too confused and chaotic to be of much use. See also *EEOC v. Missouri Pac. R. Co.*, 493 F.2d 71, 74 (8th Cir. 1974).

compelling reasons are required to overturn Circuit precedent. "*Stare decisis* is of fundamental importance to the rule of law," *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202, and has even greater force when the precedent in question involves a statutory construction. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172.

We also note that this Court based *Zimmerman* on a reading of the statute's plain text that we continue to endorse. As the *Zimmerman* panel noted, the phrase "for each working day" must be given some meaning within the context of the statute, and the most natural interpretation of that phrase looks to the number of employees physically at work on each day of the week. Plaintiffs suggest an alternative interpretation that looks to situations when an employee joins or exits the payroll mid-week; this seems a highly unlikely reading of the statute, particularly since instances where employees begin work on Wednesdays or depart on Thursdays are unlikely to occur with sufficient frequency to merit inclusion in a federal anti-discrimination statute.

While agreeing that the statute could have been worded more clearly, we believe that the *Zimmerman* court's interpretation of its plain text has stood the test of time and a new set of appellate eyes. Generally, a judicial construction of the plain language of the statute ends the matter conclusively: the law is clear that when a court can glean the meaning of a statute from its text, it should look no further. *United States v. Hudspeth*, 42 F.3d 1015, 1022

(7th Cir. 1994), *certiorari denied*, __ S. Ct. __, 1995 WL 105514 (May 30, 1995).

Notwithstanding this fact, plaintiffs contend that the recent passage of the FMLA, with a definition of "employer" that closely tracks those in the ADEA and in Title VII, is reason enough for us to re-examine *Zimmerman's* holding.[4] The Senate Report for the FMLA endorses the payroll approach to identifying employers:

> The quoted language parallels language used in Title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation. As most courts and the EEOC have interpreted this language, "employs * * * employees for each working day" is intended to mean "employ" in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be considered for this purpose.

S. Rep. No. 3, 103d Cong., 1st Sess. 21-22 (1993). Such congressional commentary, unfortunately for plaintiffs, has little effect on our view of Title VII. First, the Congress that passed the FMLA has no special sanction to interpret the actions of a previous Congress. "The interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Pub. Employees*

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[4] The FMLA defines an employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A)(I).

Retirement Sys. of Ohio v. Betts, 492 U.S. 158, 168.

Second, although plaintiffs designate the adoption of the FMLA as a "significant development of the law on the proper interpretation of the statutory definition of 'employer' contained in Title VII," Pl. Br. at 13, this purported legal milestone occurred not within the text of the statute, but within legislative history, which has no force of law. As the District of Columbia Circuit recently observed, "A congressional report, even a conference report, is not legislation ... and it does not change the law." *In re North*, 50 F.3d 42, 46 (D.C. Cir. 1995); see also *Davel v. Sullivan*, 902 F.2d 559, 562 (7th Cir. 1990) ("The words of the statute, not the words of the legislative history, control statutory interpretation").

The Supreme Court has explicitly rejected the notion that judicial interpretation of a statute owes deference to language in a legislative report. In *Pierce v. Underwood*, the Court held that where there was an "almost uniform appellate interpretation" of legislation, re-enactment of the same statutory language would be presumed to re-enact that "settled judicial interpretation" regardless of a legislative report to the contrary. 487 U.S. 552, 567. While further action taken by Congress can justify the abandonment of statutory precedent, see *Patterson v. McLean Credit Union*, 491 U.S. 164, 173, legislative history is not akin to legislative action. See *Pierce*, 487 U.S. at 567-568.

In this case, as plaintiffs point out, there is an existing

Circuit split, not a settled judicial interpretation, regarding the correct means of determining who is an employer. Still, we note that had Congress truly intended to enact the payroll method into law, it certainly could have done so in clear and unambiguous terms. *Cf. Pierce*, 487 U.S. at 568 (where legislative report is out of accord with prior usage, "the clearest indication of congressional command" will be required). Instead, knowing (because *Zimmerman* and other like cases so instructed it) that Title VII's and the ADEA's "for each working day" language was problematic, Congress chose not to respond to these concerns in enacting the FMLA. If indeed Congress wished to resolve the Circuit conflict in a particular direction, this was "a strange way to make a change." *In re North*, 50 F.3d at 46, quoting *Pierce*, 487 U.S. at 567.

Plaintiffs also argue that judicial and regulatory authority from other Circuits and from the EEOC support overruling *Zimmerman*. Among our sister Circuits, the First and Fifth have adopted the payroll method, as have a number of district courts;[5] the Eighth Circuit and several

[5] See, *e.g.*, *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634-635 (1st Cir. 1983), certiorari denied, 466 U.S. 904; *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979 n.7 (5th Cir. 1980); *Reith v. Swenson*, 63 Fair Empl. Prac. Cas. 885, 897 (D. Kan. 1993); *Cohen v. S.U.P.A. Inc.*, 814 F. Supp. 251, 254-256 (N.D.N.Y. 1993); *Vano v. Au*, 1992 WL 175498 at *2 (W.D. Va. 1992); *Gorman v. North Pittsburgh Oral Surgery Assocs. Ltd.*, 664 F. Supp. 212, 214 (W.D. Pa. 1987); *Evans v. Davie Truckers, Inc.*, 38 Fair Empl. Prac. Cas. 1553, 1554 (M.D.N.C. 1984), *affirmed*, 769 F.2d 1012 (4th Cir. 1985); *Lynn v. JER Corp.*, 573 F. Supp. 17, 20 (M.D. Tenn. 1983); *Hornick v. Borough of Duryea*, 507 F. Supp. 1091, 1098 (M.D. Pa. 1980); (continued...)

other district courts have adopted the *Zimmerman* approach.[6] The EEOC's Statement of Policy Guidance explicitly rejects the *Zimmerman* approach and endorses the payroll method. EEOC Policy Guidance, EEOC Compliance Manual, Vol. II, Notice No. N-915-052 (April 20, 1990).

Regarding the Circuit split, it is enough to note the large number of recent cases on both sides of the issue; that some courts have disagreed with our analysis while others have adopted it hardly presents a pressing reason to overturn settled precedent. The EEOC's Compliance Manual, on the other hand, was promulgated well after our decision in *Zimmerman*. While we afford deference to legitimate agency interpretations of statutory language made before we have ruled on an issue, the converse is not true: the judiciary, not administrative agencies, is the final arbiter of statutory construction. See *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843

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[5](...continued)
Pedreyra v. Cornell Prescription Pharmacies, Inc., 465 F. Supp. 936, 941 (D. Colo. 1979).

[6] See, *e.g.*, *EEOC v. Garden and Associates, Ltd.*, 956 F.2d 842 (8th Cir. 1992); *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983); *Richardson v. Bedford Place House Phase I Associates*, 855 F. Supp. 366 (N.D. Ga. 1994); *Wright v. Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ind. 1992); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 34-35 (D. Maine 1992); *Norman v. Levy*, 756 F. Supp. 1060, 1063-1064 (N.D. Ill. 1990); *EEOC v. Argent Industries, Inc.*, 746 F. Supp. 705, 708-709 (S.D. Ohio 1989), amended in part on other grounds, 58 Fair Empl. Prac. Cas. 842; *Schoenbaum v. Orange County Center for the Performing Arts, Inc.*, 677 F. Supp. 1036, 1039 (C.D. Cal. 1987).

n.9.

Finally, plaintiffs urge us to consider potential policy problems inherent in our retention of the *Zimmerman* standard in the face of a conflicting interpretation regarding the FMLA. We have not yet been asked to interpret the FMLA and decline to create a conflict where none yet exists. Plaintiffs also present a parade of horribles that could result from continued application of *Zimmerman*, most notably an employer's ability to evade the strictures of anti-discrimination legislation simply by structuring operations to avoid having the jurisdictional minimum present on each working day. Yet in more than a decade since this Court ruled in *Zimmerman*, this parade has had conspicuously few participants. Finally, plaintiffs argue that the payroll method is simpler to implement; this rationale, however, simply is not sufficient to override settled statutory interpretation.

CONCLUSION

Failing to see a compelling reason for overturning our Circuit precedent in *Zimmerman*, we affirm the judgment of the district court dismissing plaintiffs' suit for lack of jurisdiction.

RIPPLE, *Circuit Judge*, concurring. I join the judgment of the court. Although the correctness of *Zimmerman v. North American Signal Company*, 704 F.2d 347 (7th Cir. 1983), is not free from doubt, I must conclude, with some reluctance, that the EEOC has not made a sufficiently

strong case to warrant our overruling established precedent of long standing. As the majority notes, our obligation to adhere to the doctrines of stare decisis and precedent is especially strong when we are dealing with matters of statutory construction. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). That obligation is tempered somewhat by our obligation to reassess our work when a thoughtful divergence of opinion emerges from the other circuits. Upon examination of the case law to the contrary, however, I cannot say that those cases cast such a shadow on *Zimmerman* as to justify its overruling. This issue is one, however, that deserves definitive legislative attention. The ambiguity of the present situation ought to be clarified. The scope of Title VII ought to be the same in Boston and New Orleans as it is in Chicago.

APPENDIX B

United States District Court,
Northern District of Illinois,
Eastern Division

No. 93 C 2099

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

AND

DARLENE WALTERS,

Plaintiff-Intervenor,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INCORPORATED, AND LEONARD BIEBER,

Defendants.

August 30, 1994

MEMORANDUM AND ORDER

MORAN, *Chief Judge.* Plaintiff United States Equal

Employment Opportunity Commission (EEOC) and plaintiff-intervenor Darlene Walters (Walters) bring this action against Metropolitan Educational Enterprises, Inc. (Metropolitan) and Leonard Bieber (Bieber). Plaintiffs allege that Metropolitan and Bieber refused to promote Walters because of her sex and terminated her in retaliation for filing discrimination charges with the EEOC, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Walters also complains of retaliatory discharge and breach of her employment contract, in violation of Illinois law. Defendants maintain that this court lacks both federal jurisdiction over the Title VII claims and pendent jurisdiction over the state law claims because Metropolitan is not an "employer" within the meaning of Title VII. Before this court is defendants' motion to dismiss the case for lack of subject matter jurisdiction. For the reasons stated below, defendants' motion is granted.

DISCUSSION

The threshold issue in this case is whether Metropolitan qualifies as an "employer" under Title VII. This involves an interpretation of section 701(b) of Title VII, which provides that

> [t]he term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year and any agent of such a person . . .

42 U.S.C. § 2000e(b). For the purposes of § 701(b), the

"current year" means the year in which the alleged discrimination occurred. *Norman v. Levy*, 756 F. Supp. 1060, 1062 n. 3 (N.D.Ill.1990), citing *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979 n. 4 (5th Cir.1980), *overruled on other grounds, Larkin v. Pullman-Standard Div., Pullman, Inc.*, 854 F.2d 1549 (11th Cir.1988). Walters alleges that she was denied a promotion and then terminated in retaliation for filing a charge of discrimination with the EEOC in 1990. Accordingly, 1989 and 1990 are the years at issue in this case.

The parties have entered into certain stipulations regarding the number of employees employed by Metropolitan in the calendar year 1989, as well as the number of full- and part-time employees on Metropolitan's payroll in 1990, and the number of weeks that fifteen or more of these employees were working or were on paid leave in 1990. It is stipulated that defendants did not have fifteen or more employees working or on paid leave on each working day of twenty or more weeks during 1989 (Stip., ¶ 13). Metropolitan therefore does not fall within Title VII's definition of "employer" for 1989. The parties have also stipulated that Metropolitan had fifteen or more employees on its payroll for forty-seven weeks in 1990, but that in only nine of those weeks were there fifteen or more employees actually present at work or on paid leave on each working day of the week (Stip., ¶¶ 11-12).

The dispute in this case centers on the method of counting employees for Title VII purposes. Both sides agree that salaried employees are deemed employees for

every day of the week they are on the payroll, regardless of whether they are actually at work on a particular day. They disagree, however, on the status of part-time or hourly workers. Defendants maintain that the court is required to follow the method of counting employees set forth in *Zimmerman v. North American Signal Co.*, 704 F.2d 347, 353-54 (7th Cir.1983), and applied by this court in *Norman v. Levy*, 767 F.Supp. 1441, 1449 (N.D.Ill.1991). The EEOC, on the other hand, argues that *Zimmerman* was wrongly decided and that the court should employ a different method for counting employees.[1]

The plaintiff in *Zimmerman* advanced the theory that all hourly and part-time workers should be counted as employees under the Age Discrimination in Employment Act (ADEA) for each week that they are on the payroll. *Zimmerman*, 704 F.2d at 353. The Seventh Circuit rejected this interpretation. It held that hourly and part-time workers are considered employees under the ADEA only on days when they are either physically present at work or on paid leave. *Id.* at 353. The court based this finding on the language in section 11 of the ADEA, which provides that an employer must have twenty or more employees for *each working day* of a week before that week can be counted toward the jurisdictional minimum. *Id.* at 353-54. The court reasoned that the

[1] Plaintiff-intervenor Walters has conceded that, under *Zimmerman*, Metropolitan is not considered an "employer" for Title VII purposes. She acknowledges that this case must therefore be dismissed for lack of subject matter jurisdiction and that she must then ask the Seventh Circuit to reconsider *Zimmerman*.

plaintiff's proffered interpretation would render the "for each working day" language meaningless surplusage. *Id.*

The EEOC maintains that *Zimmerman* is contrary to the language, intent and purpose of Title VII and the ADEA. The EEOC alleges that public policy, principles of statutory construction, and Title VII's legislative history suggest that the method of counting employees should focus on whether an employee is on the employer's payroll rather than the employee's particular work schedule. The EEOC points to a number of decisions that have adopted the method of counting employees that the EEOC advocates, *see Evans v. Davie Truckers, Inc.*, 38 Fair Empl.Prac.Cas. (BNA) 1553, 1554 (M.D.N.C.1984), *aff'd*, 769 F.2d 1012 (4th Cir.1985); *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634-35 (1st Cir.1983), *cert. denied*, 466 U.S. 904, 104 S.Ct. 1678, 80 L.Ed.2d 153 (1984); *Pascutoi v. Washburn-McReavy Mortuary, Inc.*, 11 Fair Empl.Prac.Cas. (BNA) 1325, 1327, 1975 WL 3615 (D.Minn.1975), *aff'd*, 566 F.2d 1178 (8th Cir.1977), and others which soundly criticize the approach adopted in *Zimmerman*, *see e.g.*, *Wright v. Kosciusko Medical Clinic*, 791 F.Supp. 1327, 1332 (N.D.Ind.1992). The EEOC asks that this court modify the holding of *Zimmerman* to include all employees on the payroll, regardless of whether they were actually at work on a particular day.

This court cannot, however, modify Seventh Circuit precedent. That issue is properly left to the Seventh Circuit on appeal. It is true that *Zimmerman* was an ADEA case, while this case involves Title VII;

accordingly, *Zimmerman* is not binding authority *per se*. Nonetheless, it is well settled that cases interpreting Title VII can be used in interpreting the ADEA, and vice versa. "Because Title VII and the ADEA share 'a similar purpose—to stamp out discrimination in various forms—cases construing the definitional provisions of one [statute] are persuasive authority' when interpreting the provisions of the other." *Hayden v. La-Z-Boy Chair Co.*, 9 F.3d 617, 619 (7th Cir.1993), *cert. denied*, — U.S. —, 114 S.Ct. 1371, 128 L.Ed.2d 47 (1994), quoting *Hyland v. New Haven Radiology Assoc., P.C.*, 794 F.2d 793, 796 (2d Cir.1986), citing *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978) ("the prohibitions of the ADEA were derived *in haec verba* from Title VII"). While the Seventh Circuit has not addressed this issue in the context of Title VII, § 11 of the ADEA and § 701(b) of Title VII are virtually identical. We will therefore apply the employee counting method first set forth in *Zimmerman* and later applied in the Title VII context by this court in *Norman v. Levy*, 767 F.Supp. 1441, 1449 (N.D.Ill.1991).

The parties have stipulated that there were fifteen employees either present at work or on paid leave each day of the working week for only nine weeks of 1990 (Stip., ¶ 11). Since this falls below the jurisdictional minimum of twenty weeks, Metropolitan cannot be subject to Title VII liability for the calendar year 1990.

CONCLUSION

Metropolitan does not qualify as an employer under Title VII. The court therefore lacks jurisdiction over the subject matter of this case. The case is dismissed with prejudice.

APPENDIX C

RELEVANT PROVISIONS OF TITLE VII OF
THE CIVIL RIGHTS ACT OF 1964
42 U.S.C. § 2000e *et seq.*

§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under

section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in

which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. § 401 et seq.], and further includes any governmental industry, business, or activity.

* * * * *

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

§ 2000e-2. Unlawful employment practices

(a) **Employer practices**

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of

employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-3. Other unlawful employment practices

(a) **Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings**

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * * * *

RELEVANT PROVISIONS OF THE
AGE DISCRIMINATION IN EMPLOYMENT ACT
OF 1967
29 U.S.C. § 621 *et seq.*

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

* * * * *

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not

include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. § 401 et seq.].

* * * * *

(l) The term "compensation, terms, conditions, or

privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

* * * * *

RELEVANT PROVISIONS OF THE
FAMILY AND MEDICAL LEAVE ACT OF 1993
29 U.S.C. § 2601 *et seq.*

§ 2611. Definitions

As used in this subchapter:

(1) Commerce

The terms "commerce" and "industry or activity affecting commerce" mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include "commerce" and any "industry affecting commerce", as defined in paragraphs (1) and (3) of section 142 of this title.

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed—

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include—

(i) any Federal officer or employee covered under subchapter V of chapter 63 of Title 5; or

(ii) any employee of an employer who is employed at a work site at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that work site is less than 50.

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

(3) Employ; employee; State

The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title.

(4) Employer

(A) In general

The term "employer"—

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes—

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer; and

(iii) includes any "public agency," as defined in Section 203(x) of this title.

* * * * *

(8) Person

The term "person" has the same meaning given such term in section 203(a) of this title.

* * * * *

APPENDIX D

[Record Cite: R. 38, Ex. 2]

EEOC Notice No. N-915-052
04/20/90

1. **SUBJECT**: Policy Guidance: Whether part-time employees are employees within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA.

2. **PURPOSE**: This policy statement sets forth the Commission's position on the issue of whether part-time employees may be counted to satisfy the threshold number of employees for jurisdictional purposes.

3. **EFFECTIVE DATE**: Upon receipt.

4. **EXPIRATION DATE**: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. **ORIGINATOR**: Title VII/EPA Division, Office of Legal Counsel.

6. **INSTRUCTIONS**: File after § 605.8(b) of Volume II of the Compliance Manual.

7. **SUBJECT MATTER**:

I. INTRODUCTION

This policy statement analyzes whether a part-time employee may be counted as an employee within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA to satisfy the requisite number of employees for coverage.[1] The requirement of fifteen or more employees is a jurisdictional prerequisite for Title VII coverage, while twenty or more employees is a jurisdictional prerequisite for ADEA coverage.[2]

Section 701(b) of Title VII, 42 U.S.C. 2000e(b), defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . ."

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[1]This policy guidance is intended as an amendment and clarification to § 605.8(b) of Volume II of the EEOC Compliance Manual and will supersede any guidance to the contrary.

[2]The Commission has taken the position, in an appellant brief, that all state and local governments are covered by the ADEA, regardless of the number of its employees. See EEOC Brief in *EEOC v. Monclova Township*, (No. 89-4038) (filed January 11, 1990), *citing with approval EEOC v. Hudson Township*, 40 FEP Cases 691, 692, 40 EPD ¶ 36,129 (N.D. Ohio 1986). *But see Schaefer v. Transportation Media, Inc.*, 859 F.2d 1251, 47 EPD ¶ 38,350 (7th Cir. 1988); *Kelly v. Wauconda Park District*, 801 F.2d 269, 41 EPD ¶ 36,694 (7th Cir. 1986), *cert. denied*, 480 U.S. 940, 42 EPD ¶ 36,847 (1987); *Smith v. Wythe-Grayson Regional Library Board.*, 657 F. Supp. 1216 (W.D.Va. 1987).

Section 701(f) of Title VII, 42 U.S.C. 2000e(f), defines an employee as "an individual employed by an employer . . ." Section 11(b) of the ADEA, 29 U.S.C. 630(b), defines an employer as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . ."[3] Section 11(f) of the ADEA, 29 U.S.C. 630(f), defines an employee as "an individual employed by any employer . . ."

Neither Title VII nor the ADEA specifically defines the phrase "for each working day," as used in § 701(b) and § 11(b), and federal courts are split with regard to the method for determining whether an employer has the requisite number of employees. The majority of courts that have addressed the issue have concluded that the proper standard in determining whether an employer has the requisite number of employees is to count the number of employees maintained on the payroll in a given week, rather than the number of employees who report to work on any given day. Therefore, all regular part-time employees are counted whether they work part of each day or part of each week. *See Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634, 32 EPD ¶ 33,810 (1st Cir. 1983) (Title VII), *cert. denied*, 466 U.S. 904, 33 EPD ¶ 34,228 (1984); *Dumas v. Town of Mt. Vernon*, 612 F.2d 974, 979 n.7, 22

[3]Judicial decisions interpreting either § 11(b) of the ADEA or § 701(b) of Title VII are persuasive authority for the other, in view of the important similarities in language, structure, and purposes. The ADEA's definition of "employer" was patterned after Title VII and contains virtually identical language.

EPD ¶ 30,715 (5th Cir. 1980) (Title VII); *Gorman v. North Pittsburgh Oral Surgery Associates*, 664 F. Supp. 212, 214, 45 EPD ¶ 37,734 (W.D. Pa. 1987) (ADEA); *Evans v. Davie Truckers*, 38 FEP Cases 1553, 1554 (M.D.N.C. 1984) (Title VII), *aff'd*, 769 F.2d 1012, 38 FEP Cases 1555, 37 EPD ¶ 35,472 (4th Cir. 1985); *Lynn v. JER Corp.*, 573 F. Supp. 17, 20, 33 FEP Cases 541 (M.D. Tenn. 1983) (Title VII); *Hornick v. Borough Of Duryea*, 507 F. Supp. 1091, 1098, 25 EPD ¶ 31,569 (M.D. Pa. 1980) (Title VII); *Pedreyra v. Cornell Prescription Pharmacies*, 465 F. Supp 936, 941, 19 EPD ¶ 9,009 (D. Colo. 1979) (Title VII); *Pascutoi v. Washburn-McReary Mortuary*, 11 FEP Cases 1325, 1327, 10 EPD ¶ 10,442 (D.Minn. 1975) (Title VII), *aff'd*, 566 F.2d 1178, 20 EPD ¶ 30262 (8th Cir. 1977). *See also Musser v. Mountain View Broadcasting Inc.*, 578 F. Supp. 229, 230 (E.D. Tenn. 1984) (citing *Lynn v. JER Corp.* with approval) (Title VII); B. Schlei & P. Grossman, *Employment Discrimination Law*, 996 (2d ed. 1983); 1 Larson, *Employment Discrimination*, § 5.32 (1987).

The minority view is that part-time employees should be counted only if they work some portion of each day of the work week. Courts which ascribe to this view assert that the words "for each working day" in § 701(b) and § 11(b) necessarily import Congressional intent to restrict application of the statute to employers who had the requisite number of employees actually at work on each working day in each of twenty or more calendar weeks. Under this construction, the actual number of days worked is crucial in determining whether the part-time employee is counted as an employee. *See Zimmerman v. North*

American Signal Co., 704 F.2d 347, 353-54, 31 EPD ¶ 33,486 (7th Cir. 1983) (ADEA); *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991, 32 EPD ¶ 33, 626 (8th Cir. 1983) (ADEA); *Schoenbaum v. Orange County Center for Performing Arts*, 677 F. Supp. 1036, 1039, 44 EPD ¶ 37,499 (C.D. Cal. 1987) (ADEA); *Greear v. C.E. Electronics, Inc.*, No. C87-7749 (N.D. Ohio Aug. 3, 1988) (Title VII).

The Commission's position is that all part-time employees are counted whether they work part of each day or part of each week, as long as they are on the payroll.[4] We find no basis in the legislative history, canons of statutory interpretation, or public policy to support the *Zimmerman* position.

II. LEGISLATIVE HISTORY

The legislative history of Title VII indicates that the proper focus when determining whether an employee should be counted toward the fifteen employee requirement is whether an employment relationship exists,

[4]The Commission rejects the position taken in *Takeall v. Werd, Inc.*, 23 FEP Cases 947, 948, 19 EPD ¶ 9,035 (M.D. Fla. 1979) (Title VII), which held that those persons who merely "filled in" for a very short period of time for regular employees taking a day off or on vacation are not to be counted as "employees". The court noted that this case is distinguished from cases where an employer employs regular part-time employees on an on-going basis. The Commission believes that a person "filling in" for a regular employee should be counted as an employee during any week that (s)he is actually on the payroll.

not an employee's particular work schedule.

As noted by the First Circuit in *Thurber v. Jack Reilly's, Inc.*, the legislative history of Title VII reveals that the definition of "employer" was borrowed from the Unemployment Compensation Act, 26 U.S.C. § 3304 (1954), 110 Cong. Rec. 13087 (1964). 717 F.2d at 634. The IRS, enforcement agency of the Federal Unemployment Tax Act, ruled, in Revenue Rule 55-19 (1955), that an employee is to be counted under the Unemployment Compensation Act for each day that an employment relationship exists, regardless of whether the employee reported to work each day. This rule had been in effect for nine years before enactment of Title VII. It is appropriate to assume that since Congress specifically modeled the term "employer" from the Unemployment Compensation Act, it was aware of the enforcing agency's interpretations of "employer" and intended that "employer" under Title VII would be interpreted in the same manner. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-698, 19 EPD ¶ 9,202 (1979).

The First Circuit further noted that there is nothing in the legislative history to indicate a Congressional intent to require that employees report to work on each day that they are included. 717 F.2d at 635. If Congress had intended to exclude part-time employees, it would have expressly so stated. However, since no distinction was made between part-time and full-time employees, Congress clearly intended no distinction between employees on the basis of their work schedules.

III. STATUTORY CONSTRUCTION

The relevant principles of statutory construction are set forth in *Sutherland's Statutory Construction*,[5] which states that:

> The literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislation and if the words are sufficiently flexible to allow a construction which will effectuate the legislative intention. The intention prevails over the letter, and the letter must if possible be read to conform to the spirit of the act. While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words.

As discussed above, the legislative history indicates that Congress intended for all part-time employees to be counted. The literal interpretation of "for each working day", the *Zimmerman* approach, is contrary to that intent, particularly since Title VII is a remedial statute and the prevailing majority in Congress intended to give it broad effect. 110 Cong. Rec. 13087-13093 (1964) (Comments of Senators Morse, Saltonstall and others).

Further, the phrase "for each working day" is

[5]N. Singer, 2A *Sutherland's Statutory Construction*, § 46.07 (1984).

sufficiently flexible to allow a construction which will effectuate the legislative intent. Even a literal reading of "for each working day" lends itself to a payroll standard inasmuch as "for each working day" does not literally mean "at work," nor does the statutory language of § 701(b) or § 11(b) contain any limitation indicating that only those individuals actually at the work site on each working day are to be considered employees under Title VII.

Liberal construction should be given to the definition of employer so as to carry out the Congressional purpose of eliminating inconvenience, unfairness and the humiliation of discrimination. *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131, 23 EPD ¶ 30,933 (5th Cir. 1980); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391, 14 EPD ¶ 7,775 (8th Cir. 1977). Those courts adopting a payroll standard stressed that it is in accord with the universally held principle that Title VII is a remedial statute that should be given the broadest possible interpretation consistent with its humanitarian purpose. *Thurber*, 717 F.2d at 634-635; *Pedreyra*, 465 F. Supp. at 941; *Pascutoi*, 11 FEP Cases at 1326-1327.

Moreover, Title VII defines "employee" broadly as an "individual employed by an employer." It is of critical significance that the statute itself does not limit the definition of employee by the number of hours worked each day. *Pedreyra*, 465 F. Supp. at 941. In *Armbruster v. Quinn*, 711 F.2d 1332, 1340, 32 EPD ¶ 33,702 (6th Cir. 1983), the court stressed that "the term employee is clearly

to be given a broad construction under all provisions of the Act." "Were there a[ny] doubt or ambiguity in the matter," the court held, "we would resolve it in favor of coverage." *Id.* at 1341.

IV. PUBLIC POLICY CONSIDERATIONS

Public policy considerations weigh in favor of the broadest possible interpretation and dictate against the consequences that a stricter construction would have.

Under the *Zimmerman* approach, an employee who works two hours on each day of a five-day work week is counted towards the fifteen employee requirement for that week. Yet, an employee who works eight hours a day for four days of a five-day work week is not counted on the fifth day and therefore, not counted for that week, even though this employee would have worked more than three times as many hours. Also, conceivably under this approach, an employer who has a seven-day work week could claim that an employee who works eight hours per day for five days per week is not at work on each of the seven working days and therefore may not be counted as an employee. Employers could therefore manipulate work schedules to avoid coverage under Title VII. In rejecting this approach, *Gorman v. North Pittsburgh Oral Surgery Associates* reasoned that, "[u]nder this construction [the *Zimmerman* approach], a business that operates almost entirely with part-time labor could escape the prohibitions of the ADEA, despite the number of workers actually

employed." 664 F. Supp. at 214.

Further, proof under the *Zimmerman* approach would be difficult for plaintiffs to obtain. Even assuming that an employer kept and maintained time cards and leave records, it would be an extremely tedious task to determine how many employees reported to work each day during the two-year period provided for by the statute. Although an employer's payroll records may indicate the number of hours an employee worked in a given week, they may not reveal on which days an employee reported to work.

Results such as those discussed above would not occur if the number of employees maintained on the payroll is counted when determining whether the fifteen employee requirement is met. The payroll is a reliable indicator of those individuals who have an employment relationship with the employer and are therefore employees.

Therefore, statutory construction permits, and policy considerations and congressional intent mandate that under Title VII an employer who has fifteen employees on the payroll for twenty weeks of the year meets the statutory definition of employer, while under the ADEA an employer who has twenty employees on the payroll for twenty weeks of the year meets the statutory definition of employer.

V. CONCLUSION

The Commission's position is that all regular part-time employees are counted whether they work part of each day or part of each week.

Example:

Employer has a work sharing plan to meet the growing demand of employees who desire to work part-time. Employer has three full-time and twelve part-time employees. Six of the twelve part-time employees work three days per week, while the other six part-time employees work four hours per day each of the five working days. All twelve of the part-time employees are counted because they are all regular part-time employees on an on-going basis. Therefore, Employer is covered by Title VII.

4/20/90
Date

/s/
Evan J. Kemp, Jr.
Chairman